No. 09-5678646 & No. 09-56846

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROSALINA CUELLAR DE OSORIO; *et al.*,
Plaintiffs-Appellants,
v.

ALEJANDRO MAYORKAS; *et al.*,
Defendants-Appellees.

TERESITA G. COSTELO, and LORENZO P. ONG, Individually
And On Behalf Of All Others Similarly Situated,
Plaintiffs – Appellants,
v.

JANET NAPOLITANO,
Secretary Of The Department Of Homeland Security; *et. al.*
Defendants - Appellees.

APPELLANTS' PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Nancy E. Miller
Robert L. Reeves
Anthony J. Favero

Reeves and Associates, APLC
2 North Lake Avenue, Suite 950
Pasadena, CA 91101
(626)795-6777

Amy Prokop
Carl Shusterman

Law Offices of Carl Shusterman
600 Wilshire Blvd., Suite 1550
Los Angeles, CA 90017
(213) 623-4592

Attorneys for Plaintiffs-Appellants

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I. STATEMENT

These consolidated cases involve a question of exceptional importance warranting en banc consideration: the proper interpretation of a key provision of the Child Status Protection Act (CSPA), 8 U.S.C. § 1153(h)(3), INA § 203(h)(3). Congress passed the CSPA in 2002 to ensure that parents would not be separated from their sons and daughters after the family had spent years of waiting in line to immigrate to the U.S. together. This is exactly what occurs under the flawed reasoning of the Board of Immigration Appeals (BIA) in *Matter of Wang*, 25 I&N 28 (2009) to which the panel deferred.

Administrative agencies are not permitted to nullify laws passed by Congress. Despite clear and unambiguous statutory language to the contrary, *Matter of Wang* restricts the benefits of § 203(h)(3) solely to a single category of immigrants: sons and daughters who were sponsored by a permanent resident parent. The BIA thereby denies the benefits of § 203(h)(3) to sons and daughters who were sponsored along with their parents by close relatives who are U.S. citizens. The panel's decision conflicts with established precedent which holds that, "when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion." *See, e.g., Padash v. INS*, 358 F.3d. 1161, 1173 (9th Cir. 2004).

Moreover, the panel's decision conflicts with recent holdings issued by two

other Circuit Courts. Shortly after the panel's decision, the U.S. Court of Appeals for the Fifth Circuit held that the language of the statute was clear and unambiguous and refused to defer to *Matter of Wang*. *See, Khalid v. Holder*, 2011 U.S. App. LEXIS 18622 (5th Cir., Sept. 8, 2011). Unlike the panel's decision, *Khalid* cites this Court's decision in *Padash* with approval and rejects the restrictive and erroneous holding of the BIA in *Matter of Wang*. Also relevant is the holding of the U.S. Court of Appeals for the Second Circuit on this issue which, despite reading the CSPA in a restrictive fashion, also declines to defer to *Matter of Wang*. *See*, *Li v. Renaud*, 2011 U.S. App. LEXIS 13357 (2nd Cir., June 30, 2011).

These consolidated cases include a nationwide class action, and thus the panel's decision has a broad impact nationwide. Rehearing en banc is required in light of the overriding need for national uniformity in the proper application of § 203(h)(3).

II. BACKGROUND

Immigration laws permit children to immigrate to the United States together with their parents, whether the parents have been sponsored for permanent residence by their relatives, through employment, or through the visa lottery. INA § 203(d). To qualify as a child one must be unmarried and under 21 years of age. INA § 101(b). However, many immigration preference categories entail waiting

times of 10 to over 20 years. Prior to the enactment of the CSPA in 2002, if a child reached the age of 21 years before obtaining permanent residence, he was no longer able to immigrate to the U.S. along with his other family members. Also, the child was not given credit for the years he spent waiting to qualify for permanent residence.

The CSPA was enacted in order to address the predicament of certain individuals who were classified as children under the immigration laws when an immigrant visa petition was filed, but who turned 21 and lost their eligibility to immigrate to the U.S. together with the rest of their family. Section 3 of the CSPA is entitled "Treatment of Certain Unmarried Sons and Daughters Seeking Status As Family-Sponsored, Employment-Based, and Diversity Immigrants." This section provides two distinct benefits to children who would otherwise lose immigration benefits when they reach the age of 21. First, the law allows a child to subtract agency processing times from his or her age, thus enabling some children to remain eligible as derivative beneficiaries of their parent's visa petitions even after turning 21. INA § 203(h)(1).

If the individual does not benefit from the subtraction contained in § 203(h)(1), he or she is no longer eligible to immigrate as a derivative child. But the CSPA provides an alternative benefit to these individuals. Under INA § 203(h)(3), such an aged-out child may retain the priority date associated with the

petition filed on behalf of the parent, and may automatically convert to the appropriate immigrant category. This provision credits children with the years they already spent waiting in line with their parents, thereby shortening or in some cases eliminating their period of separation from the rest of their family.

There is no factual dispute in the cases at hand. Appellants are all lawful permanent residents of the United States who immigrated based on the visa petitions submitted by their U.S. citizen family members.[1] Each Appellant is the parent of a child initially included as a derivative beneficiary of the visa petition filed on their parent's behalf. Their children turned 21 before visa numbers were available, and consequently lost the ability to immigrate as derivatives. After attaining lawful permanent residence, the Appellants filed visa petitions on behalf of their adult sons and daughters. However, the U.S. Citizenship and Immigration Service (USCIS) failed to accord their sons and daughters the original priority date as required by the CSPA. Consequently, depending on their country of origin, they will be separated from their families for 8 - 18 years. See State Department Visa Bulletin: http://travel.state.gov/visa/bulletin/bulletin_5572.html (accessed October 10, 2011).

Appellants assert that their children are entitled to automatic conversion and

1 Specifically, petitions by U.S. citizens on behalf of a married son or daughter under INA § 203(a)(3), and petitions by U.S. citizens on behalf of a sibling under

priority date retention under INA § 203(h)(3), and they filed suit in 2008 seeking declaratory and mandamus relief.[2] The District Court denied Appellants' motions for summary judgment and deferred to a contrary interpretation of § 203(h)(3) set forth in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009). In *Wang*, the BIA limited the applicability of § 203(h)(3) to beneficiaries in the second family preference category (INA § 203(a)(2)). On appeal a three member panel of this Court affirmed the District Court's decision deferring to the BIA's interpretation of § 203(h)(3). *De Osorio v. Mayorkas*, 2011 U.S. App. LEXIS 18289 (9th Cir. Sept. 2, 2011).

III. REASONS WHY REHEARING SHOULD BE GRANTED

A. Rehearing is required in light of the existing circuit split regarding § 203(h)(3).

The need for national uniformity on this issue is acute. Decisions from the three Circuit Courts that have addressed the issue have essentially created a three-way split. The Second Circuit was the first to address § 203(h)(3) in *Li v. Renaud*, 2011 U.S. App. LEXIS 13357 (2nd Cir., June 30, 2011). In *Li,* the Court refused to defer to the BIA's interpretation in *Matter of Wang* because it found that Congress' intent was clear. *Li* at

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INA § 203(a)(4).

2 The case of Rosalina Cuellar de Osorio involved several named plaintiffs who sought relief under INA §203(h)(3). The case of Teresita G. Costelo and Lorenzo Ong was filed as a class action lawsuit presenting an identical legal issue. On appeal, the cases were consolidated before this Court.

18 – 19. In analyzing the text of § 203(h)(3), the Court in *Li* focused exclusively on the phrase "converted to the appropriate category," and held that the phrase does not "encompass transformations of a petition filed by one family sponsor to a petition filed by another family sponsor." *Id.* at 25. A petition for rehearing en banc is pending in the *Li v. Renaud* case.

Subsequently, in the instant case, the panel took a different approach. They held that despite the plain language of § 203(h)(3), it did not practicably apply to certain petitions covered by its plain terms. The panel deferred to the interpretation set forth in *Matter of Wang.*

The Fifth Circuit held otherwise in *Khalid v. Holder*, 2011 U.S. App. LEXIS 18622 (5th Cir., Sept. 8, 2011). The Court held that the BIA's interpretation of § 203(h)(3) contravened the plain language of the CSPA. They found that under traditional canons of statutory construction the ambiguity alleged by the BIA was in fact nonexistent. In this regard the Fifth and Ninth Circuits are in agreement, as both decisions recognize the interdependency between each subsection in § 203(h). However, the Fifth Circuit refused to ignore the plain language of the Act. Despite the alleged differences between § 203(h)(3) and prior practice regarding conversion and retention, the Court held that "resort to these arguments cannot make ambiguous what the statute's plain language and structure make so clear." *Khalid,* at 20 – 21.

The need for national uniformity in immigration laws presents an issue of

exceptional importance warranting en banc consideration. This court should follow the straightforward approach taken by the Fifth Circuit in *Khalid*, and apply § 203(h)(3) to all beneficiaries covered by its terms.

B. The panel's deference to *Matter of Wang* is inappropriate in light of the clear and unambiguous statutory scheme.

The panel's decision violates a fundamental rule of statutory construction: Courts do not owe deference to an agency's interpretation when the language of the statute is plain. "If the intent of Congress is clear, the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc*. 467 U.S. 837, 842 – 43 (1984).

In *Matter of Wang*, the BIA found that INA § 203(h)(3) was ambiguous because it was unclear which petitions are covered by its terms. The BIA stated: "Unlike §§ 203(h)(1) and (2), which when read in tandem clearly define the universe of petitions that qualify for the 'delayed processing formula', the language of § 203(h)(3) does not expressly state which petitions qualify for automatic conversion and retention of priority dates. Given this ambiguity, we must look to the legislative intent behind § 203(h)(3)." *Wang*, 25 I & N Dec. at 33. Without further analysis, the District Court held that it "endorse[d] the explanation of this ambiguity articulated in *Wang* itself." *Zhang v. Napolitano*, 663 F.Supp. 2d 913,

919-920 (C.D. Cal., 2009).

The panel finds no such ambiguity and explains:

> Paragraph (3)'s initial clause makes it contingent upon the operation of paragraph (1)… Thus, paragraph (3) is triggered only if one has determined by doing the age-reduction calculation in paragraph (1) that an alien is 21 or over. If it is triggered, "the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." *Id*. Because "the alien" is necessarily one to whom paragraph (1) was applied, "the alien's petition" naturally refers to the "applicable petition" that was considered in paragraph (1)(B). *De Osorio*, at 17 – 18.

The panel correctly recognizes the interrelated nature of each subparagraph of § 203(h). *See also, Khalid*, at 18 -19 (Congress intended (h)(3) to apply to any alien who "aged out" under the formula in (h)(1) with respect to the universe of petitions described in (h)(2)). The panel's reasoning thus conflicts with the BIA's finding of ambiguity in *Matter of Wang.* As a result of their faulty reasoning, the BIA found § 203(h)(3) ambiguous and moved on to an analysis of legislative intent; an analysis which the panel ultimately finds "permissible." However, when there is a "straightforward statutory command, there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6, (1997); *see also Ratzlaf v. United States*, 510 U.S. 135, 147 (1994) ("We do not resort to legislative history to cloud a statutory text that is clear.")

Having refuted the BIA's erroneous finding of ambiguity, the panel should have followed the statute's plain language rather than defer to *Wang*. *See*, *Khalid v.*

Holder, 2011 U.S. App. LEXIS 18622, at 16 ("The only ambiguity the BIA has identified in the statute is the universe of petitions to which subsection (h)(3) applies. On this point, Congress has plainly spoken in subsection (h)(2). Accordingly, we hold that the 'automatic conversion' and 'priority date retention' benefits in (h)(3) unambiguously apply to the entire universe of petitions described in (h)(2)").

C. The panel erred when it determined that the plain language would lead to unreasonable or impracticable results.

The panel recognized that the language of § 203(h)(3) is plain: beneficiaries of all family, employment and diversity categories are covered by the terms of § 203(h)(3). Nonetheless, they reason that "[d]espite paragraph (3)'s plain language, it does not practicably apply to certain of the petitions described in paragraph (2)." *De Osorio*, at 20 (internal citations omitted). The Supreme Court has stated that only the "most extraordinary showing of contrary intentions" will allow a Court to depart from the plain meaning of a statute. *Garcia v. United States*, 469 U.S. 70, 75 (1984); see also *United States v. Wiltberger*, 18 U.S. 76, 96 (1820) ("The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words ... in search of an intention which the words themselves did not suggest."). The panel's decision runs afoul of this principle.

The panel reasons that the phrase " 'the alien's petition shall automatically

be converted to the appropriate category'…suggests that the same petition, filed by the same petitioner for the same beneficiary, converts to a new category." *De Osorio*, at 20. This reads restrictive language into the statute which simply does not exist. The plain language of § 203(h)(3) does not demand the same petition, filed by the same petitioner for the same beneficiary. Indeed, if this is what Congress intended they could have easily accomplished this result by containing such limiting language in the statute. For instance, 8 CFR § 204.2(a)(4), which the BIA cited in *Wang*, provides that a priority date will be retained "if the subsequent petition is **filed by the same petitioner**." (Emphasis added). There is no such limiting language in § 203(h)(3).

The panel's decision offers no plausible reason why Congress would choose to benefit a small subset of individuals who are otherwise covered by § 203(h)(3). Such an interpretation ignores those in the *nine* other categories who would otherwise be covered by its plain terms.[3] Courts must "assume that in drafting legislation, Congress said what it meant." *United States v. LaBonte*, 520 U.S. 751, 757, 1 (1997). If the language of the statute is clear, the agency and the Court must give effect to that language.

Contrary to the panel's decision, there is nothing unreasonable or

3 Those preference categories include unmarried adult children of US citizens, married children of US citizens, siblings of US citizens, beneficiaries of the five

impracticable with applying § 203(h)(3) to all the beneficiaries who are covered by its terms. The practicality and reasonableness of such application is demonstrated by the decision of the Court of Appeals for the Fifth Circuit in *Khalid*, which held that the aged-out beneficiary of a fourth preference petition is entitled to automatic conversion and priority date retention under § 203(h)(3). As noted by the Fifth Circuit, the BIA itself applied § 203(h)(3) in this manner in unpublished decisions disregarded by the BIA in *Matter of Wang*. *Khalid, at 16 – 17.*

In *Matter of Maria T. Garcia*, 2006 WL 2183654 (BIA June 16, 2006), Maria Garcia was the derivative beneficiary of a fourth-preference petition filed on behalf of her mother on January 13, 1983. A visa number did not become available until 13 years later, when Ms. Garcia was 22 years old. Upon becoming a permanent resident Ms. Garcia's mother filed a new I-130 petition on her behalf. Ms. Garcia argued that she benefitted from § 203(h)(3), and a three-member panel of the BIA agreed. The BIA reasoned that:

> [W]here an alien was classified as a derivative beneficiary of the original petition, the 'appropriate category' for purposes of section 203(h)(3) is that which applies to the 'aged-out' derivative vis-à-vis the principal beneficiary of the original petition…The respondent was (and remains) her mother's unmarried daughter, and therefore the 'appropriate category' to which her petition was converted is the second-preference category of family-based immigrants …Furthermore, the respondent is entitled to retain the January 13, 1983, priority date that applied to the original fourth-preference petition…" *Matter of Maria T. Garcia*, 2006 WL 2183654 at p. 4 (BIA June

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employment-based categories, and beneficiaries in the diversity visa category.

16, 2006) (emphasis in original). See also, *Matter of Elizabeth F. Garcia*, 2007 WL 2463913 (BIA July 24, 2007).

It is the BIA's interpretation in *Matter of Wang*, followed by the panel, which leads to the unreasonable result of excluding a significant class of individuals who are otherwise covered by the statute's terms. The Ninth Circuit has recognized that, "when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion. This rule applies with additional force in the immigration context, where doubts are to be resolved in favor of the alien." *Akhtar v. Burzynski*, 384 F.3d 1193, 1200 (9th Cir. 2004); see also *Padash v. INS*, 358 F.3d 1161, 1173 (9th Cir. 2004). The panel ignored this rule and erred in deferring to an administrative decision which seeks to interpret the provisions of INA § 203(h)(3) in the most restrictive way.

D. Only the Appellants' interpretation gives meaning to every word in the statute.

In *Matter of Wang*, the BIA fails to give effect to each of the key phrases in § 203(h)(3). When Congress uses the phrase "for purposes of subsections (a)(2)(A) and (d)," it plainly includes derivatives in all family, employment and diversity categories. However the practical effect of *Matter of Wang* is to the limit the applicability of § 203(h)(3) to the aged-out beneficiaries of second preference family petitions alone. If this result was what Congress intended, there would be

no reason to include an unrestricted reference to § 203(d).

The panel reasons that reference to both § 203(a)(2)(A) and § 203(d) is required so that both primary and derivative beneficiaries of second preference petitions are entitled to automatic conversion and priority date retention. *De Osorio*, at 28 – 29. To the contrary, a child included as a derivative in a second preference petition still meets the definition of § 203(a)(2)(A): "immigrants who are the spouses or children of an alien lawfully admitted for permanent residence." Moreover, it is unreasonable to assume that Congress intended solely to codify a benefit that was already provided by regulation. See 8 C.F.R. § 204.2(a)(4) (if the derivative beneficiary of a second preference spousal petition ages out, he may retain the original priority date associated with the F2A petition upon the filing of a F2B petition by his permanent resident parent.)

Under the BIA's interpretation, Congress' use of the phrase "for purposes of (a)(2)(A) and (d)" means one thing in subsection (h)(1), and something completely different in subsection (h)(3). Such an interpretation is unreasonable and violates the principal that "identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs*., Inc., 551 U.S. 224, 232 (2007).

The BIA's interpretation also ignores Congress' use of the terms "appropriate category," "original priority date," and "original petition." If a new

relationship, and perhaps even the filing of a new petition, are not permitted under the CSPA, there will only ever be one petition, with one possible priority date. See *Khalid*, at 25 (Under the BIA's reading, "there would always be only one petition, with an unchanged priority date. The BIA's interpretation renders the retention benefit provision redundant and reads it out of the statute.") By using the broad terms "appropriate category," "original priority date," and "original petition" Congress clearly contemplated benefitting classes beyond the second family preference category.

The Appellants' reading also gives effect to the term "automatic conversion." The BIA reasoned that, when a derivative of a fourth-preference petition ages out, there is no category to which he can automatically convert because there is no category for nieces and nephews of U.S. citizens. *Wang*, at 35. Only the child of a permanent resident would be able to convert from the child of a permanent resident (203(a)(2)(A)), to the adult son or daughter of a permanent resident (203(a)(2)(B) upon aging out. However, under § 203(h) it is clear that the conversion cannot occur at the exact moment the beneficiary reaches the age of 21.

The automatic conversion and priority date retention under § 203(h)(3) can only operate once a determination has been made under § 203(h)(1). That subsection begins with an analysis of the beneficiary's age on the "date on which an immigrant visa number becomes available." INA § 203(h)(1)(A). As explained

by the Fifth Circuit in *Khalid*, "at that time, there would be another category to convert to based on the derivative's relationship with the primary beneficiary." Significantly, the panel's decision supports this reading and thereby undermines the reasoning of *Wang*. The panel states, "[p]aragraph (3) cannot possibly operate at the moment the derivative turns 21, because it is not even triggered until the derivative has already been determined to be at least 21 even after subtracting pending petition time as required by paragraph (1). *De Osorio*, at 22 – 23, footnote 5.

Courts "must make every effort not to interpret the provisions in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous." *Boise Cascade Corp. v. EPA*, 942, F.2d 1427, 1432 (9th Cir. 1991). *United States v. Wenner*, 351 F.3d 969, 975 (9th Cir. 2003) (noting the fundamental principle of statutory construction that a statute should not be construed to render certain words or phrases mere surplusage). See also, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (A statute ought to be construed so that no clause, sentence, or word shall be superfluous, void, or insignificant). The Appellants' interpretation is the only interpretation which gives effect to every word in § 203(h)(3), allowing the plain language of the act to control without the need for the implicit exceptions required under *Wang*.

E. The panel's reasoning misstates and misconstrues Congressional intent

The panel concludes that *Wang* is a permissible interpretation that does not run afoul of Congressional intent. In *Wang*, the BIA reasoned that Congress did not intend to provide any relief for delays attributed to backlogs in visa availability. *Wang*, 25 I & N Dec. at 38. ("…there is no clear evidence that it was intended to address delays resulting from visa allocation issues, such as the long wait associated with priority dates."). This conclusion is plainly wrong. *See Li v. Renaud,* 2011 U.S. App. LEXIS 13357, at 8 – 9 (recognizing that the CSPA was intended to address both agency processing delays and delay due to oversubscription of visa numbers); *see also*, *Khalid v. Holder*, 2011 U.S. App. LEXIS 18622, at 21 – 22 (noting that CSPA's Senate sponsor discussed the "age out" problem both in terms of agency delay and visa demand). Unlike the BIA, the panel does not ignore the comments of Senator Feinstein when she introduced the CSPA in the Senate. However, they state that "she focused only on children of LPRs, who could fall into the F2A category." *De Osorio*, at 31 – 32. This is incorrect.

Senator Feinstein began her statement by discussing one specific example of a lawful permanent resident who filed petitions for her three children, who then subsequently turn 21 and lost their eligibility for permanent residence under the second preference (2A) category. She then states that the CSPA as a whole "would

provide a child, whose timely filed application for a **family-based, employment-based, or diversity visa** was submitted before the child reached his or her 21st birthday, the opportunity to remain eligible for that visa until the visa becomes available. The legislation would also protect the child of an asylum seeker whose application was submitted prior to the child's 21st birthday." 147 Cong. Rec. S 3275 (April 2, 2001) (emphasis added). While Senator Feinstein's *first* example discusses children of lawful permanent residents, it is clear that the CSPA was intended to benefit children in other preference categories as well. To say that Congress as a whole, and Senator Feinstein in particular, was focused only on children of permanent residents is belied by the Congressional record. More importantly it is belied by the plain language of § 203(h)(3) which encompasses derivative beneficiaries in all visa preference categories.

The panel recognizes that Congress intended to "provide some measure of age-out relief to all derivative beneficiaries of family preference petitions." *De Osorio*, at 30. In the panel's view it is apparently enough that all beneficiaries are protected from administrative delays under § 203(h)(1), and that only a tiny subsection of beneficiaries are entitled to receive benefits under § 203(h)(3). However, the agency cannot take away one benefit that Congress provided to a class and justify its actions by saying that they are not taking away all benefits. Congress added INA § 203(h)(3) because they were concerned with separation of

families due to oversubscription of visa categories. The section serves no other purpose, and should be given full effect.

IV. CONCLUSION

For the foregoing reasons, Appellants request that the Petition for Panel Rehearing or Rehearing En Banc be granted.

Dated: October 17, 2011

Respectfully Submitted,
Law Offices of Carl Shusterman

/s/Amy Prokop

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Carl Shusterman
Amy Prokop

Reeves and Associates, APLC
/s/ Nancy E. Miller

_____

Nancy E. Miller
Robert L. Reeves
Anthony J. Favero

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc is proportionately spaced, has a typeface of 14 points or more and contains 4,197 words.

Dated: October 17, 2011

Law Offices of Carl Shusterman

/s/Amy Prokop

Carl Shusterman
Amy Prokop

Reeves and Associates, APLC
/s/ Nancy E. Miller

Nancy E. Miller
Robert L. Reeves
Anthony J. Favero

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on **October 17, 2011**, I electronically filed the foregoing APPELLANTS' PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 17, 2011

Law Offices of Carl Shusterman

/s/Amy Prokop

Amy Prokop

Nos. 09-56786 & 09-56846

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v.

JANET NAPOLITANO,
Secretary of the Department Of Homeland Security; *et. al.*
Defendants-Appellees.

BRIEF OF AMERICAN IMMIGRATION COUNCIL AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING AND PETITION FOR REHEARING *EN BANC*

Mary Kenney
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7512
(202) 742-5619 (fax)

CORPORATE DISCLOSURE STATEMENT UNDER RULE Fed. R. App. P. 26.1

I, Mary Kenney, attorney for *amici curiae*, certify that the American Immigration Council is a non-profit organization that does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

Date: October 24, 2011

s/ Mary Kenney

Mary Kenney

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I. INTRODUCTION

Through this brief, *amici curiae* the American Immigration Council and the American Immigration Lawyers Association (AILA) respectfully submit that the panel erred in deciding to disregard the unambiguous statutory language of the Child Status Protection Act (CSPA), codified at 8 U.S.C. § 1153(h)(3). The panel wrongly found that this case qualifies as one of those rare instances where the plain language of a statute is inconsistent with congressional intent. Significantly, one week after the panel decided this case, the Court of Appeals for the Fifth Circuit issued a decision on the precise issue, demonstrating that the statute could be applied consistently with it plain language without leading to an "impracticability." *Khalid v. Holder*, No. 10-60373, __ F.3d __, 2011 U.S. App. LEXIS 18622 (5th Cir. Sept. 8, 2011). To reconcile the split that now exists with the Fifth Circuit on the meaning of 8 U.S.C. § 1153(h)(3), *amici curiae* urge the Court to grant Plaintiffs' Petition for Rehearing or Rehearing En Banc.

This Court's determination of the meaning of 8 U.S.C. § 1153(h)(3) is of exceptional importance not only because it conflicts with another circuit's determination, but also because it arises in a national class action, likely involving thousands of lawful permanent residents and their sons and daughters whom they seek to sponsor as immigrants to the U.S. When these

sons and daughters were minor children, they all were named as derivative beneficiaries of visa petitions filed on their parent's behalf in the 3rd and 4th family preference categories.[1] Unfortunately, due to the excessive world-wide demand for a limited number of visas in all family-based preference categories, they all "aged-out" before a visa became available for them, even under the favorable age preservation formula found in the CSPA. Plaintiffs and *amici curiae* submit that the panel erred in concluding that these sons and daughters are not eligible for either of the alternate benefits Congress provided for in § 1153(h)(3).

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy and to advance fundamental fairness, due process, and constitutional and human rights in immigration law and administration. The American Immigration Council has a direct interest in ensuring that the CSPA is applied in an ameliorative fashion.

AILA is a national association with more than 10,000 members nationwide, including lawyers and law school professors who practice and

[1] A 3rd preference visa petition in the family-based categories is one that is filed by a U.S. citizen parent for a married son or daughter. 8 U.S.C. § 1153(a)(3). A 4th preference visa petition is one that is filed by a U.S. citizen for a brother or sister. 8 U.S.C. § 1153(a)(4). In both categories, a child of the principal beneficiary can be named as a derivative beneficiary on the visa petition. 8 U.S.C. § 1153(d).

teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters.

II. ARGUMENT

A. This is not the "rare and exceptional" case in which the plain language of the statute can be disregarded.

Khalid v. Holder, No. 10-60373, __ F.3d __, 2011 U.S. App. LEXIS 18622 (5th Cir. Sept. 8, 2011), issued one week after the panel decision here, demonstrates the error in not applying the plain language of § 1153(h)(3). In *Khalid*, the Fifth Circuit found that the plain language of 8 U.S.C. § 1153(h)(3)[2] made clear that it applied to derivative beneficiaries of visa petitions filed in *all* family-based visa preference categories, in part because of its explicit reference to 8 U.S.C. § 1153(d).[3] *Id.* at *19-20 (emphasis

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[2] This section reads as follows:
(3) Retention of priority date. – If the age of an alien is determined under paragraph (1) to be 21 years of age or older for purposes of subsections (a)(2)(A) and (d), the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.

[3] Section 1153(d) reads as follows:

added). On this point, both *Khalid* and the panel here agree. *See De Osorio v. Mayorkas*, No. 09-56846, __ F.3d __, 2011 U.S. App. LEXIS 18289, at *19 (9th Cir. Sept. 2, 2011) (concluding that the plain language of § 1153(h)(3) applies to "F2A petitions for a child and any family preference petition for which a child is a derivative beneficiary").[4]

Unlike the panel here, however, the Fifth Circuit considered all relevant terms in the statute and, in light of this analysis, concluded that it was bound by § 1153(h)(3)'s unrestricted and unambiguous reference to all visa categories via its reference to § 1153(d). *Khalid*, 2011 U.S. App. LEXIS 18622 at *19-20. As a result, the court held that the petitioner in the case – a derivative beneficiary of a family-based 4th preference category – was eligible for the benefits of § 1153(h)(3). *Id*. at *31. In contrast, *De Osorio* determined that the plain language of § 1153(h)(3) could be disregarded because its application would be "impracticable." *De Osorio*,

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> (d) Treatment of family members.—A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of section 101(b)(1) shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c), be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.

[4] An "F-2A" petition is one filed by a lawful permanent resident for his or her spouse or children under the family-based visa category specified in 8 U.S.C. § 1153(a)(2).

2011 U.S. App. LEXIS 18289 at *20. In reaching this conclusion, the panel focused only on one term in the statute – "automatically" – and concluded that this term "suggested" that the original petition and the converted petition would be one and the same. *Id*. at *21 (noting that the "same petition can simply be reclassified 'automatically.'").[5]

Amici curiae respectfully submit that § 1153(h)(3) is not one of the "rare and exceptional case[s]," *Ardestani v. I.N.S.*, 502 U.S. 129, 135-36 (1991), that require an interpretation at odds with the statute's plain language. To the contrary, *Khalid* demonstrates that a review of § 1153(h) as a whole compels an interpretation consistent with the statute's plain language.

This Court has repeatedly emphasized the importance of adhering strictly to Congress' intent as expressed in unambiguous language. *See, e.g.*, *Singh v. Holder*, 649 F.3d 1161 (9th Cir. 2011) (*en banc*). "There is a strong presumption that the plain language of the statute expresses congressional intent, which is 'rebutted only in rare and exceptional circumstances, when a

[5] *Khalid* considered the meaning of several terms in § 1153(h)(3), including "convert," "original petition," and "original priority date." 2011 U.S. App. LEXIS 18622 at *22-27. While *De Osorio* discusses the meaning of the "retention" clause, it does so only after determining that – due solely to the word "automatically" in the "conversion" clause – application of the plain language would be impracticable. *De Osorio*, 2011 U.S. App. LEXIS 18289 at *24-25. Moreover, it never considered the significance of the terms "original petition" and "original priority date."

contrary legislative intent is clearly expressed.'" *Royal Foods Co. Inc. v. RJR Holdings Inc.*, 252 F.3d 1102, 1108 (9th Cir. 2001) (quoting *Ardestani*, 502 U.S. at 135-36). Here, there is no question that an interpretation consistent with the plain language also is consistent with legislative intent. As *De Osorio* specifically recognizes, "[i]t is clear that Congress wanted the CSPA to provide some measure of age-out relief to *all* derivative beneficiaries of family preference petitions." *De Osorio*, 2011 U.S. App. LEXIS 18289 at *30 (emphasis in original).[6]

The result of the panel's decision is that it ignores Congress' explicit reference to § 1153(d), which unambiguously includes derivatives of *all* family-based petitions. Instead, *De Osorio* affirms the interpretation of the Board of Immigration Appeals (Board or BIA) in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), which reads the reference to § 1153(d) as if it included

[6] The panel also determined that the opposite interpretation of the statute did not contradict Congress' intent because this interpretation preserved some meaning – although not the plain meaning – of Congress' reference to § 1153(d). *Id.* The fact that this non-literal interpretation is not inconsistent with Congress' intent says nothing about whether a "literal application of a statute will produce a result demonstrably at odds with the intention of its drafters," the standard for disregarding a statute's plain meaning. *Nuclear Information and Resource Service v. U.S. DOT Research and Special Programs Administration*, 457 F.3d 956, 961 (9th Cir. 2006) (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). Here, the legislative record reveals several purposes to be served by the statute; as noted, one of these purposes – providing age-out protection to derivatives of all family preference categories – would be served by a literal interpretation.

only one subset of family based visa petitions, the family 2A preference category. *See De Osorio*, 2011 U.S. App. LEXIS 18289 at *27 ("The effect of *Matter of Wang* is to limit § 1153(h)(3)'s applicability to only one petition type: F2A.").

As *Khalid* explains, however:

> it seems unlikely that Congress would exclude an entire class of derivative beneficiaries from subsection (h)(3)'s benefits by silent implication based on the unwritten assumption that the petitioner must remain the same. Rather one would expect any such exclusion to be express, since it would effectively operate categorically.

2011 U.S. App. LEXIS 18622 at *28. The Fifth Circuit's observation is particularly true where the regulation that the Board believed Congress was codifying is, itself, explicit in its reference to petitions filed under § 1153(a)(2), thus demonstrating how simple it would have been for Congress to be equally direct had this been the intended result. *See* 8 C.F.R. § 208.2(a)(4).

Moreover, an examination of the language about retention of the original priority date supports a broad interpretation, consistent with Congress' unrestricted reference to § 1153(d), that derivatives of all visa preference categories are eligible for the benefits of § 1153(h)(3). The panel did not consider this language. Instead, *De Osorio's* impracticability determination hinges entirely on its consideration of one word,

"automatically," and its conclusion that this word suggests that the "*same* petition, filed by the *same* petitioner for the *same* beneficiary, converts to the new category." 2011 U.S. App. LEXIS 18289 at *20 (emphasis in original).

The statutory language does not contain these restrictions, however. While use of the term "automatically" does indicate that the conversion occurs by operation of law, this says nothing about the mechanics of how such a conversion is to happen. The word "automatically" does not mean that there are no procedural mechanisms at play. For example, when a vehicle goes on "automatic pilot," there is a trigger that starts this function. Here, the subsequent visa petition which the parent of the derivative beneficiary files on his or her behalf is simply the trigger that puts into operation the automatic conversion.

Moreover, *De Osorio's* interpretation renders the "retention" benefit redundant. Had Congress intended that there be only one petition, "there would be no need for the statute to explicitly state that the alien 'retains the *original* priority date issued upon the receipt of the *original* petition'" because, with only one petition, there would be only one, "unchanged priority date." *Khalid*, 2011 U.S. App. LEXIS 18622 at *25 (emphasis added). Additionally, as *Khalid* also notes, reference to the "original" petition indicates that there is another, non-original petition involved. *Id.*

Because the retention provision contradicts the assumption that § 1153(h)(3) does not encompass the filing of a new petition, it undercuts the central basis for the panel's decision to take the rare step of ignoring the plain language of a statute.

B. Because the BIA never considered whether § 1153(h)(3)'s two benefits operated independently, there is no agency interpretation warranting the Court's deference.

Even were the panel correct in finding that the automatic conversion language of § 1153(h)(3) is ambiguous, it made the further mistake of declining to find that this benefit operated independently of the priority date retention benefit. The panel did find that these two benefits were contained in "two grammatically independent clauses" and that, as a result, the provision could be read as "conferring automatic conversion and priority date retention as independent benefits." *De Osorio*, 2011 U.S. App. LEXIS 18289 at *24. Because the panel also found that the provision could be read as conferring joint benefits, however, it determined that the statute was ambiguous in this respect. It then deferred, under step two of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), to what it perceived to be the Board's conclusion that "priority date retention could *not* operate separately from automatic conversion." *De Osorio*, 2011 U.S.

App. LEXIS 18289 at *26-27 (emphasis in original) (citing *Matter of Wang*, 25 I&N Dec. at 36).

Amici curiae respectfully submit that the Board never addressed the question of whether § 1153(h)(3) could be interpreted as providing two independent benefits. Instead, in *Matter of Wang*, the Board *assumed* without analysis that the two benefits were entirely dependant upon one another. Because the Board did not address this question, there is "no binding agency precedent on-point" and *Chevron* deference is inapplicable. *Retuta v. Holder*, 591 F.3d 1181, 1187 (9th Cir. 2010) (citations omitted); *see also Barber v. Thomas*, 130 S. Ct. 2499, 2508 (2010) ("Because the Commission has expressed no view on the question before us, we need not decide whether it would be entitled to deference had it done so"); *Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1196 (9th Cir. 2006) (declining to give *Chevron* deference to the Board's interpretation of the statute where it did not address Sinotes-Cruz's actual claim).

The panel notes that *Matter of Wang* "rejected the contention that 'all children who were derivative beneficiaries would gain favorable priority date status, even with regard to a new visa petition that is wholly independent of the original petition and that may be filed without any time limitation in the future.'" *De Osorio*, 2011 U.S. App. LEXIS 18289 at *26-

27 (quoting *Matter of Wang*, 25 I&N Dec. at 36). The panel relies upon this statement to conclude that the Board expressly found that the two benefits could not operate independently. *Id.* In fact, however, the Board was rejecting Wang's argument that both benefits should be applied to him. *Matter of Wang*, 25 I&N Dec. at 36. Neither here nor elsewhere in its decision did the Board address the grammatical question of whether the two benefits could be read as operating independently.

Thus, there is no Board decision to defer to on this point. Moreover, the only interpretation that allows all the words in the statute to be given their entire, plain meaning, is one that reads the benefits as operating independently. Under such an interpretation, the panel's interpretation of "automatically" could stand, with the conversion benefit being limited to only the family 2A visa category. In turn, the retention of priority date benefit would apply to all visa categories, thus giving full meaning to Congress' unrestricted reference to § 1153(d) and to its choice of the word "original" in the phrases the "original priority date" and the "original visa petition."

III. CONCLUSION

For all of the reasons stated, *amici curiae* respectfully urge the Court to grant Plaintiffs' Petition for Rehearing or Rehearing En Banc and to issue

a new decision finding that § 1153(h)(3) applies to derivative beneficiaries of all family-based visa categories.

Respectfully submitted,

s/ Mary Kenney

Mary Kenney
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7512
(202) 742-5619 (fax)
mkenney@immcouncil.org

Dated: October 24, 2011

Attorney for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 29-2(c)(2), I hereby certify that the attached brief of *amici curiae* is proportionately spaced, has a typeface of 14 points or more and, according to computerized count, contains 2,150 words.

Date: October 24, 2011

s/ Mary Kenney

Mary Kenney

CERTIFICATE OF SERVICE

When All Case Participants are Registered
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U.S. Court of Appeals Docket Nos. 09-56786 & 09-56846

I, Mary Kenney, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 24, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Mary Kenney

Mary Kenney
American Immigration Council

Date: October 24, 2011

Nos. 09-56786 & 09-56846

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROSALINA CUELLAR DE OSORIO; *et al.*,
Plaintiffs-Appellants,
v.
ALEJANDRO MAYORKAS; *et al.*,
Defendants-Appellees.

TERESITA G. COSTELO, and LORENZO ONG, Individually and on Behalf of All Others Similarly Situated,
Plaintiffs-Appellants,
v.
JANET NAPOLITANO, Secretary of Homeland Security; *et al.*,
Defendants-Appellees.

DEFENDANTS-APPELLEES' BRIEF IN OPPOSITION TO PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING AND PETITION FOR REHEARING *EN BANC*

TONY WEST
Assistant Attorney General

ELIZABETH J. STEVENS
Assistant Director
District Court Section
Office of Immigration Litigation

GISELA A. WESTWATER
AARON D. NELSON
Office of Immigration Litigation
U.S. Department of Justice
PO Box 868, Ben Franklin Station
Washington, DC 20044
(202) 532-4174

Attorneys for Defendants-Appellees

INTRODUCTION

The original decision in these consolidated cases provided a comprehensive analysis of the proper interpretation of 8 U.S.C. § 1153(h)(3), which was enacted as part of the Child Status Protection Act ("CSPA"), Pub. L. 107-208, 116 Stat. 927 (Aug. 6, 2002). Although other courts of appeals have considered the meaning of Section 1153(h)(3), only this Court in *Osorio* fully considered the text, operation, and context of this provision in determining its ambiguity. *Osorio v. Mayorkas*, 656 F.3d 954, 961-62 (9th Cir. Sept. 2, 2011). Only this Court, in light of its correct finding of ambiguity, has fully considered and deferred to *Matter of Wang*, 25 I. & N. Dec. 28 (BIA 2009), a precedential decision of the Board of Immigration Appeals ("Board") that reasonably interprets Section 1153(h)(3).

In their petition for rehearing and petition for rehearing *en banc*, Plaintiffs-Appellants present no new legal arguments and misconstrue several aspects of the *Osorio* decision. *See generally Osorio v. Mayorkas*, No. 09-56786 (9th Cir.), Appellants' Petition for Rehearing and Petition for Rehearing *En Banc* ("P-A Petition"), ECF. No. 45-1. *Amici curiae* also fail to raise any legal arguments not previously considered and rejected by this Court in *Osorio*. *Id.*, Br. of Am. Immigration Council and the Am. Immigration Lawyers Association as *Amici Curiae* in Supp. of the Pls.-Appellants' Pet. for Reh'g and Pet. for Reh'g *En Banc*

("*Amicus* Brief"), ECF No. 48-2. Instead of raising new legal arguments, Plaintiffs-Appellants and *Amici* principally argue that the contradictory interpretations of 8 U.S.C. § 1153(h)(3) reached by two other courts of appeals militate in favor of rehearing by this Court. However, the decisions of those courts are diametrically opposite and thus do not present a cohesive interpretation of the CSPA. In particular, the other circuits draw contrary conclusions about what they both deem to be an "unambiguous" operative provision of the statute. These conflicting interpretations undermine the validity of those decisions and their underlying statutory analyses. By comparison, this Court's thorough analysis in *Osorio* of the text, context, and congressional history reinforces the correctness of its decision. Rehearing should be denied.

I. BACKGROUND.

This Court in *Osorio* interpreted paragraph (3) of Section 1153(h), which provides that an alien, whose age "is determined . . . to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) shall have his petition automatically convert[] to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." 8 U.S.C. § 1153(h)(3). Three basic immigration concepts are implicated in the interpretation of this statute: (1) movement (or "conversion") between various

congressionally-authorized immigrant visa classifications; (2) assignment of visa priority dates and the historical application of transfer between both immigrant visa classifications and petitions; and (3) congressional policies behind immigration classifications.

The Board examined the statute at issue in its *Wang* decision. *Wang*, 25 I. & N. Dec. 25. First, looking at the text of paragraph (3) and its relationship to paragraphs (1) and (2), the Board determined that the scope of the provision is ambiguous. *Id*. at 33. Fully considering the text of the provision, its context within the specific section and the larger statutory scheme of the Act, its general context in immigration law, and the legislative history of the Act, the Board determined that paragraph (3) only applied to aliens classified as primary beneficiaries of an F2A[1] petition and aliens classified under "(d)" as derivative beneficiaries of F2A petitions. *Id.* at 38-39.

After performing its own analysis of the meaning of the statute, this Court in *Osorio* properly found the statute ambiguous (although on different grounds than *Wang*) and granted deference to the Board's reasonable analysis. *Osorio*, 656

[1] "F2A" refers to the family-sponsored immigrant classification for adult sons and daughters of lawful permanent residents. *See* 8 U.S.C. § 1153(a)(2)(A). Throughout this brief, each family-sponsored classification is referred to by the letter "F" and the corresponding statutory authority.

F.3d at 965 (determining that "limiting § 1153(h)(3)'s applicability to F2A petitions is 'a reasonable policy choice for the agency to make.'" (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984))).

II. REASONS WHY REHEARING IS UNNECESSARY AND UNWARRANTED.

A. The current circuit split validates the *Osorio* court's determination that the statute is ambiguous.

Plaintiffs-Appellants argue that rehearing is necessary so this Court may consider the decisions reached by the two other courts of appeals that have interpreted 8 U.S.C. § 1153(h)(3). *See Li v. Renaud*, 654 F.3d 376 (2d Cir. June 30, 2011); *Khalid v. Holder*, 655 F.3d 363 (5th Cir. Sept. 8, 2011). Unlike this Court in *Osorio*, which found the statute ambiguous, both the Second Circuit and the Fifth Circuit determined that 8 U.S.C. § 1153(h)(3) is unambiguous.[2] Paradoxically, although both courts claimed to have only given meaning to the plain language of the statute, they arrived at completely opposite interpretations.

[2] The Second Circuit denied plaintiffs-appellants' petition for rehearing in *Li* on October 26, 2011. *See Li v. Renaud*, No. 10-2560, Oct. 26, 2011, ECF. No. 120 (2d Cir. 2011) (denying petition for rehearing and rehearing *en banc*). On November 28, 2011, the Fifth Circuit requested petitioner respond to the Government's petition for rehearing *en banc*. *See Khalid v. Holder*, No. 10-60373, Nov. 28, 2011 (5th Cir. 2011).

In *Li*, the Second Circuit glossed over the generalized reference to derivative beneficiaries in Section 1153(h)(3) (the "and (d)" language) which formed the basis for the Board's determination in *Matter of Wang* that the statute is ambiguous. The Second Circuit never formally analyzed which petitions are eligible for consideration under Section 1153(h)(3), instead focusing on a more fundamental inquiry concerning which petitions could benefit from the provision. *Li*, 654 F.3d at 382. The Second Circuit determined that "Congress's intent on this point was clear. Section 1153(h)(3) does not entitle an alien to retain the priority date of an aged-out family preference petition if the aged-out family preference petition cannot be 'converted to [an] appropriate category.'" *Id.* at 383. Although declining to defer to the Board's interpretation in *Matter of Wang* on the ground that the relevant parts of the statute are not ambiguous, the Second Circuit nonetheless arrived at the same interpretation as the Board in *Matter of Wang*. *Id.* at 385.

In *Khalid*, the Fifth Circuit took a different approach, focusing first and foremost on the "and (d)" language in the paragraph. The *Khalid* court's interpretation of the entire provision was driven by its finding that the reference to "(d)" in paragraph (3) was unrestricted, such that every type of derivative beneficiary was eligible for consideration under that paragraph irrespective of the

immigrant visa categories. *Khalid*, 655 F.3d at 371. Taking this holding one step further, the *Khalid* court reasoned that Congress must have intended a petition considered under Section 1153(h)(3) to also benefit under Section 1153(h)(3). *Khalid*, 655 F.3d at 373. Despite the conclusions in *Wang*, *Li*, and *Osorio*, that the terms "automatic conversion" and "appropriate category" are immigration-specific terms, the *Khalid* court found their meanings to be clear without regard to their past use in the immigration context and operation in the global statutory scheme. *Id.* The Fifth Circuit dismissed any operational difficulties as irrelevant, narrowing its analysis only to determining which petitions are referenced in Section 1153(h)(3). *Id*. Since its analysis was not grounded in the historical usages of these terms, the *Khalid* court was able to cursorily dismiss the operational difficulties that compelled contrary interpretations in *Wang*, *Li,* and *Osorio*. *Id.* ("Even if the issues the BIA identified would create procedural difficulties, it is not this court's responsibility to resolve them."). The Fifth Circuit then adopted Khalid's "straightforward interpretation" mistakenly finding it provided for the "automatic conversion" of the original petition without any operational difficulties. *Id.* at 372.

The Fifth Circuit erroneously determined that the conversion would not cause conflict since, at the time a visa number becomes available to the primary

beneficiary, "there would be another category to convert to based on the derivative's relationship with the primary beneficiary." *Id.* *See also* P-A Pet. at 19-20 and *Amicus* Br. at 9 (both citing this finding approvingly and arguing that it was error for the *Osorio* panel to reject this position). The Fifth Circuit's holding, and Plaintiffs-Appellants and *Amici*'s arguments, all rest on a faulty premise. On the date that a visa number becomes available to the primary beneficiary of an F3 or F4 petition, that aged-out derivative beneficiary is still the son or daughter of an intending immigrant -- not the son or daughter of a lawful permanent resident eligible for classification under F2B. Eligibility for that category, at a minimum, is still months away, and contingent upon the satisfaction of separate admissibility requirements. A visa number becoming available to the primary beneficiary only means that the primary beneficiary is entitled to apply to begin consular processing (if outside the United States) or to adjust status (if within the United States). *See Ogbolumani v. USCIS*, 523 F. Supp. 2d 864, 869-70 (N.D. Ill. 2007) (general discussion of immigration procedures). There is therefore at least a several month gap between the time the age calculation is triggered under 8 U.S.C. § 1153(h)(1) and the time that the aged-out derivative beneficiary may become eligible for an F2B classification. 8 U.S.C. § 1153(a)(2)(B) (classifying adult sons and daughters of lawful permanent residents). This gap in classification certainly

manifests the operational ambiguity identified by this Court in *Osorio*. *Osorio*, 656 F.3d at 962.

The Government is seeking rehearing in *Khalid* precisely because of that court's incomplete analysis of the statute and the faulty premise underlying its adoption of Khalid's "straightforward interpretation." *See Khalid v. Holder*, No. 10-60373 (5th Cir.), Petition for Rehearing *En Banc*, Nov. 14, 2011, at 8-9 ("Ambiguity remains in the statute, however, as the Ninth Circuit properly acknowledged, when the whole of section [1153(h)(3)] is examined. *Osorio v. Mayorkas*, 656 F.3d 954, 962-63 (9th Cir. 2011). Rather than undertake this assessment, the panel focused on the first half of the provision in undertaking its *Chevron* analysis."). Given the shortcomings of the *Khalid* analysis, rehearing by this Court in order to address the *Khalid* decision is not warranted.[3]

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[3] Plaintiffs-Appellants and *Amici* both argue that the statute is unambiguous. Plaintiffs-Appellants, like the Fifth Circuit, claim that "automatic conversion" takes place when a visa number becomes available to the primary beneficiary. P-A Br. at 19-20. Yet, *Amici* advocate a totally different position, claiming that the trigger for the "automatic conversion" is "the subsequent visa petition which the parent of the derivative beneficiary files on his or her behalf" [after the parent gains lawful permanent resident status]. *Amicus* Br. at 13. Plaintiffs-Appellants and *Amici* fail to acknowledge that, by proffering different triggers for automatic conversion, they are proving that the statute is inherently ambiguous. Additionally, since the filing of a second petition is not explicitly referenced in the statute but the statute does specifically refer to the availability of a visa as a triggering date, the *Osorio* panel was justified in rejecting *Amici*'s position. *Osorio*, 656 F.3d at 963.

In support of rehearing, Plaintiffs-Appellants also cite the need for "national uniformity in immigration laws." P-A Pet. at 6. Yet, reconsideration by the panel or even a panel *en banc* will not resolve the circuit split. Reconsideration could only maintain the *status quo* or create a circuit split in the opposite direction. The goals of uniformity are more easily met by reconsideration and reversal of the *Khalid* decision in the Fifth Circuit because such a reversal would result in agreement among the courts of appeal.[4] In light of this Court's inability to cure a circuit split, reconsideration should be denied.

B. Deference to *Matter of Wang* is particularly appropriate in light of the circuit split.

Plaintiffs-Appellants argue that because the statute is unambiguous, reconsideration is needed to reverse this Court's grant of deference in *Osorio* to *Wang*. P-A Petition at 7. Yet, the Second and Fifth Circuits' diametrically opposite interpretations of the "plain language" of the paragraph support the *Osorio* determination that the statute is indeed ambiguous. *See Bassiri v. Xerox Corp.*, 463 F.3d 927, 931 (9th Cir. 2006) (disagreement among courts suggests ambiguity); *Beck v. City of Cleveland*, 390 F.3d 912, 920 (6th Cir. 2004) ("Judicial

[4] The Second Circuit has already denied rehearing in *Li*. *Li*, No. 10-2560 (2d Cir. Oct. 26, 2011). The Fifth Circuit is currently considering rehearing *en banc* in *Khalid*. Khalid, No. 10-60373 (5th Cir. November 28, 2011).

decisions that differ on the proper interpretation of [a statute] reflect this ambiguity."); *State Ins. Fund v. S. Star Foods (In re Southern Star Foods)*, 144 F.3d 712, 715 (10th Cir. 1998) ("The split in the circuits is, in itself, evidence of the ambiguity of the phrase."). Thus, the panel was correct in finding the statute ambiguous and then deferring to the Board's interpretation. Rehearing is not needed. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (U.S. 1999) (published Board decisions are accorded *Chevron* deference, so long as they are reasonable).

C. The *Osorio* court was justified in finding that the initially plain meaning of "and (d)" had to be analyzed deeper given its conflict with other terms of the statute.

Plaintiffs-Appellants argue that rehearing is warranted because the panel failed to give meaning to the "plain language" of the terms "and (d)." P-A Pet. at 9. This Court in *Osorio* correctly recognized, however, that language which appears unambiguous must be further analyzed if it leads to absurd results. *See Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) ("The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context."). The problem with Plaintiffs-Appellants' argument is that the supposedly "plain term" "and (d)" is in tension with other seemingly plain terms of the statute. Such instances of internal conflict manifest a statute's ambiguity and the need for an agency to reconcile the terms of

the statute in such a way as to further congressional intent. *See Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1141 (9th Cir. 2001) (finding statute "inherently ambiguous [where] it appears to use language in a manner in some tension with ordinary usage"). This Court in *Osorio* noted two impracticalities resulting from Plaintiffs-Appellants's position: first, automatic conversion could not occur smoothly for aged-out derivative beneficiaries of F3 and F4 petitions; and second, derivative interests would be raised on par with primary interests without any clear guidance that Congress intended such a fundamental change in the immigration scheme. *Osorio*, 656 F.3d at 962, 965. Given these significant difficulties in applying "and (d)," this Court in *Osorio* correctly entered into a deeper analysis of the entire statutory provision.

Plaintiffs-Appellants and *Amici* further argue that rehearing is needed because this Court in *Osorio* failed to give meaning to the term "original petition," which connotes that there is more than one petition at issue. P-A Br. at 18-19; *Amicus* Br. at 8. What Plaintiffs-Appellants and *Amici* fail to acknowledge is that under the interpretations adopted by the Board, the Second Circuit, and this Court in *Osorio*, the term "original petition" is given meaning. When the derivative beneficiary of an F2A petition automatically converts, his or her parent, the primary beneficiary, still has an interest in the "original petition." Thus, this

original petition "splits" into two: the original petition for the parent (spouse of a lawful permanent resident) and a petition for the aged-out derivative beneficiary who is now the primary beneficiary (as an adult son or daughter of a lawful permanent resident) of an independent petition. The notional spin-off petition is now entitled to the same priority date as the parent has on the "original petition." Since the *Osorio* decision gives meaning to the term "original petition," there is no need for rehearing of this matter.

Plaintiffs-Appellants also fault this Court for failing to read the statute broadly enough to benefit all categories of aliens included under the terms "and (d)." P-A Pet. at 9-10. Broad reading of ameliorative statutes such as the CSPA, however, is meant to further Congress' intent to benefit a certain group of individuals, not to read a statute to apply a benefit to a group outside of Congress' zone of interest in passing the legislation. Despite the Ninth Circuit's endorsement of a broad reading of the CSPA generally, the Ninth Circuit has consistently declined to expand the CSPA beyond the literal limits established by Congress. *Compare Padash v. INS*, 358 F.3d 1161 (9th Cir. 2004) ("adopting a restrictive reading of the statute in order to limit relief, would contravene Congress's intent, and the purpose and objective of the law") *with Flores del Toro v. Mukasey*, 286 Fed. Appx. 425 (9th Cir. 2008) (CSPA does not impute parent's

continued presence in the United States to children); *Alonso-Varona v. Mukasey*, 319 Fed. Appx. 502, 504 (9th Cir. 2009) (CSPA does not revive terminated petitions); *Ochoa-Amaya v. Gonzales*, 479 F.3d 989, 992-93 (9th Cir. 2007) (CSPA does not encompass the time spent awaiting visa availability); *Catalan-Zacarias v. Ashcroft*, 73 Fed. Appx. 284 (9th Cir. 2003) (CSPA did not apply to derivative deportation relief). *See also Perez-Olano v. Gonzales*, No. 05-03604, 2008 U.S. Dist LEXIS 85675 (C.D. Cal. Jan. 8, 2008) (CSPA does not apply to special immigrant juveniles); *Corea v. Att'y Gen.*, 170 F. App'x 700 (11th Cir. 2006) (CSPA does not protect aliens who are under 21 when they enter the United States and age-out during processing for benefits under the Nicaraguan Adjustment and Central American Relief Act); *Midi v. Holder*, 2009 WL 1298651 (4th Cir. May 12, 2009) (CSPA does not apply to some Haitian refugees even though Congress affords CSPA protection "to the children of many other refugees"). Moreover, when applied across the board as Plaintiffs-Appellants and *Amici* advocate, the statute is not ameliorative for everyone: since available visas are finite, primary beneficiaries who have been independently-classifiable under the immigration laws for several years will be displaced by these aged-out grandchildren and nieces and nephews of United States citizens who were never eligible for independent classification. *See Wang*, 25 I & N. Dec. at 38 ("If we

interpret section [1153](h) as the petitioner advocates, the beneficiary, as a new entrant in the second-preference visa category line, would displace other aliens who have already been in that line for years before her."); *Osorio*, 656 F.3d at 965 (Plaintiffs-Appellants' interpretation "would effectively treat an aged-out derivative beneficiary of an F3 or F4 petition as if he or she had been independently entitled to his or her own priority date based on his or her status as the grandchild, niece, or nephew of a citizen."). Thus, this Court in *Osorio* correctly followed Ninth Circuit guidance in identifying the intended scope of the benefit intended by Congress.[5]

D. All issues raised by Plaintiffs-Appellants and *Amici* were fully briefed, considered, and decided by the *Osorio* panel.

Plaintiffs-Appellants argue that rehearing is needed because this Court in *Osorio* failed to give meaning to "and (d)" since derivative beneficiaries of F2A

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[5] Plaintiffs-Appellants' erroneously state that the panel "offers no plausible reason why Congress would choose to benefit a small subset" of the aliens originally classified under Section 1153(d). P-A Pet. at 15. To the contrary, the panel noted that the "small subset" of aliens receiving relief under the Board's interpretation are not similarly situated to aged-out derivative beneficiaries of F3 and F4 petitions. Only primary beneficiaries of F2A petitions and derivative beneficiaries under Section 1153(d) of F2A petitions are independently classifiable as children of lawful permanent residents. Only these same individuals eligible for follow-on classifications. *Osorio*, 656 F.3d at 962. Congress could provide this limited benefit without fundamentally changing the family preference scheme. *Id.* at 965. These are sufficient reasons for Congress to limit a benefit to this group.

petitions are actually classified under F2A and not "(d)". P-A Pet., ECF No. 45-1 at 17-20. This argument is neither new nor availing. Given the methodology used by Congress in this provision, all derivatives are referenced under the "and (d)" language - including derivative beneficiaries of F2A petitions because derivative beneficiaries of F2A petitions are aliens "determined under paragraph (1) to be 21 years of age or older for the purposes of subsection[] (d)." 8 U.S.C. § 1153(h)(3). *Osorio*, 656 F.3d at 964 (Board's "construction does not render § 1153(h)(3)'s reference to § 1153(d) meaningless."). All courts (including the *Wang*, *Khalid*, *Li*, and *Osorio* courts) have found that "and (d)" refers to aliens classified under any family, employment, or diversity category on the basis of a parent-child relationship described in Section 1153(d). Accordingly, rehearing is not merited on this point.

Rehearing likewise is not merited to reconsider *Amici*'s argument that the "unambiguous" text of the statute provides "conversion" and "priority date retention" as two separate benefits. *Amicus* Brief at 13. The *Osorio* court already considered this position and determined that while it may be a possible construction of the statute, it is not compelled by the plain meaning of the statute. *Osorio*, 656 F.3d at 963. Further review of this argument is not warranted.

CONCLUSION

While there is conflicting language in paragraph (3) of Section 1153(h), the Board has reconciled the language -- a responsibility specifically left to the agency, not Plaintiffs-Appellants or *Amici*. *See* 8 C.F.R. § 1003.1(d)(1). Because the Board filled the gaps in a reasonable manner, the *Osorio* court correctly granted deference to the Board's interpretation. Rehearing and rehearing *en banc* are not warranted.

November 29, 2011

Respectfully submitted,

TONY WEST
Assistant Attorney General
Civil Division
U.S. Department of Justice

ELIZABETH J. STEVENS
Assistant Director
District Court Section
Office of Immigration Litigation

/s/ Gisela A. Westwater
GISELA A. WESTWATER
Senior Litigation Counsel
Gisela.Westwater@usdoj.gov
District Court Section
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P. O. Box 868 Ben Franklin Station
Washington, DC 20044
Telephone: (202) 532-4174

/s/ Aaron D. Nelson
AARON D. NELSON
Trial Attorney
Aaron.Nelson@usdoj.gov
District Court Section
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 868 Ben Franklin Station
Washington, DC 200044

Attorneys for Defendants-Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the Government's Brief:

(1) was prepared using 14-point Times New Roman font;

(2) is proportionally spaced; and

(3) consists of 3,723 words and 16 pages, excluding portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), consistent this Court's order of November 8, 2011 (ECF No. 50).

November 29, 2011

/s/ Gisela A. Westwater
GISELA A. WESTWATER
Senior Litigation Counsel
District Court Section
Office of Immigration Litigation
Civil Division
U.S. Department of Justice

Attorney for Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2011, I electronically filed the foregoing DEFENDANTS-APPELLEES' BRIEF IN OPPOSITION TO PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING AND PETITION FOR REHEARING *EN BANC* with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

Attorneys for Costelo, et al.:

Anthony J. Favero
REEVES & ASSOCIATES
Ninth Floor
2 North Lake Avenue
Pasadena, CA 91101-1871

Jeremiah Johnson, Attorney
Reeves & Associates, APLC
Suite 1080
388 Market Street
San Francisco, CA 94111

Nancy Ellen Miller, Esquire, Attorney
LAW OFFICES OF REEVES & ASSOCIATES
9th Floor
Two North Lake Avenue
Pasadena, CA 91101

Robert L. Reeves, Esquire, Attorney
LAW OFFICES
Suite 950
Two North Lake Ave.
Pasadena, CA 91101

Attorneys for Osorio, et al.:

Amy Prokop, Attorney
LAW OFFICES OF CARL M. SHUSTERMAN
Suite 1550
600 Wilshire Blvd.
Los Angeles, CA 90017

Carl Shusterman
LAW OFFICES OF CARL M. SHUSTERMAN
Ste. 1550
600 Wilshire Blvd.
Los Angeles, CA 90017

Amici Curiae:

Mary A. Kenney
AMERICAN IMMIGRATION LAW FOUNDATION
1331 "G" Street, NW
Washington, DC 20005

November 29, 2011

/s/ Gisela A. Westwater
GISELA A. WESTWATER
Senior Litigation Counsel
District Court Section
Office of Immigration Litigation
Civil Division
U.S. Department of Justice

Attorney for Defendants-Appellees